BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KORRI RASMUSSEN, Claimant, v. GARY W. LONGFELLOW, dba SLIMS RECYCLING, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2007-029514** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** filed May 21, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Lewiston on February 12, 2008. Claimant participated by phone; his attorney, Michael T. Kessinger, was present. Bradley J. Stoddard of Coeur d'Alene represented Employer/Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken but the parties submitted post-hearing briefs, and this matter came under advisement on April 23, 2008.

ISSUE

By agreement of the parties, the sole issue to be decided by the Commission as the result of the hearing is whether Claimant suffered an injury arising out of and in the course of his employment.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered an inguinal hernia shortly after picking up a 200-pound piece of scrap metal at Employer's metal recycling business. Further, even though Claimant's accident was unwitnessed and he failed to relate his hernia to that event until he was so informed by his doctor, a presumption arises that he suffered a compensable injury because he was injured on Employer's premises and Defendants have failed to rebut that presumption.

Defendants contend that Claimant's failure to report the "lifting incident" from which his injury allegedly flowed until he filed his Complaint, in spite of many earlier opportunities to do so, is proof that his unwitnessed accident did not occur and was only concocted after the fact to satisfy the accident requirement of compensability. Defendants do not directly address Claimant's presumption argument.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The telephonic testimony of Claimant, and the personal testimony of his co-worker Randy Hust, Employer's wife and office manager Doreen Longfellow, and Surety's claims examiner Andrea Parsons.

2. Claimant's Exhibits A-E.

3. Defendants' Exhibits A-H.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 28 years of age and resided with his parents in White Sulphur Springs, Montana, at the time of the hearing. As Claimant was having difficulty traveling to

Lewiston for the hearing, the parties stipulated to allowing him to testify telephonically from Montana. He resided in Clarkston, Washington, at the time of his alleged industrial accident.

2. Claimant graduated from high school in White Sulphur Springs in 1997. He then enlisted in the Army where he served eight years before being honorably discharged. While serving in the Army, he suffered a gunshot wound to his right lung from which he recovered without residuals.

3. Claimant's first job out of the military was with Employer's metal recycling business. His duties included general labor and heavy machine operator and mechanic. He was also required to lift objects weighing up to 100 pounds occasionally.

4. Claimant described his alleged accident this way:

> Q. (By Mr. Kessinger): Okay. So you were saying you tried to pick it (a 200 pound metal plate) with the machine, that didn't work, and then you can pick up where you left off.
>
> A. I physically went over and tried to pick it up by hand, and I got it to about my knees and I couldn't do it no more, my body said, you know, something's not right, so I dropped it and let it hit the ground. And about then Randy was - - called for me, asked me to come help him, and I turned around and got about ten feet away and the pain hit me in my lower left side like something had kicked me in my pelvic bone and broke it, broke my hip or something. And I hit my knees and urinated on myself.

Hearing Transcript, p. 42.

Claimant did not feel any pain at the time he lifted the metal plate.

5. Claimant's co-worker, Randy Hust ("Randy"), testified as follows in response to a question from Claimant's counsel regarding what happened to Claimant on August 21st:

> Okay. And he (Claimant) was over going - - doing something at the time, I'm not sure exactly, but I whistled for him to come over and give me his opinion on, you know, what bin we should dump out first. And he come walking down - - he came walking around the bins, and he dropped down to one leg, and he kind of just kind of kneeled there for a minute. And I asked him if he was all right, and he didn't really answer, he kind of just stayed in that position. And so I walked - - walked over there to him and asked him again, and he said that he felt like he

> broke his tail bone or something. He said he wasn't all right. And he kind of got up and kind of held his side. And then I went up and told Gary (Employer), he's hurt.

Hearing Transcript, p. 21.

6. Doreen Longfellow, Employer's wife and office manager ("Doreen"), testified that she talked to Claimant shortly after his alleged accident and before Randy took him to the hospital. Claimant did not inform her of the lifting incident, but she could see that he was in pain. Claimant told her he was walking "from point A to point B" when he felt a sharp, stabbing pain.

7. Claimant presented to St. Joseph Regional Medical Center in Lewiston soon after his alleged accident. The attending physician noted, "The patient is a 28 year-old male who states he was at work. He was walking across level ground when he had the sudden onset of severe left groin pain. He states he dropped to his knees and he had urinary incontinence when the pain hit." Claimant's Exhibit E, p. 5. Claimant was diagnosed with a left inguinal hernia and referred to surgeon Gary Thorne, M.D.

8. Claimant first saw Dr. Thorne on August 29, 2007, at which time he reported, "This patient is a 28 year-old white male who performs rather significant heavy lifting while working at a steel salvage yard." Claimant's Exhibit E, p. 7. Dr. Thorne performed hernia repair surgery on August 31, 2007. Other than developing an infection, Claimant's course of recovery was unremarkable.

DISCUSSION AND FURTHER FINDINGS

An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Idaho Code § 72-102(17)(b). Emphasis added. An injury is defined as a personal injury caused by an

accident arising out of and in the course of employment. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102(17)(a). Emphases added. A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as having "more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903,906 (1974).

A **presumption** arises that an injury arises out of and in the course of employment when the accident occurs on the employer's premises. *Foust v. Birds Eye Division of General Foods Corp*., 91 Idaho 418, 422 P.2d 616 (1967). However, the mere fact that the injury occurs on the employer's premises is not the exclusive test for compensability, but is only one factor to be considered. *Dinius v. Loving Care and More, Inc*., 133 Idaho 572, 990 P.2d 738 (1999), citing *In re Malmquist*, 78 Idaho 117, 300 P.2d 820 (1956). An employee does not have to be actually engaged in the performance of a task of employment at the time of the accident to recover if there was an exposure to risk by reason of employment. *Dinius, Id*., citing *Nichols v. Godfrey*, 90 Idaho 345, 351, 411 P.2d 763, 766 (1966).

9. The Referee has his doubts regarding the happening of the lifting incident. Claimant testified that he knew that his hernia was related to the lifting incident on the day after it happened. Yet, Claimant did not tell Doreen, Dr. Thorne (at least according to his records), or,

more importantly, a claims examiner for Surety of lifting anything at or near the time of the onset of his symptoms. The claims examiner, Andrea Parsons, testified at hearing that when she first spoke with Claimant on September 4, 2007, she wrote that Claimant informed her as follows:

> Clmt [*sic*] states that he went to work like every other day. He was moving things with the forklift and then walked across the jobsite. He states that he suddenly had onset of extreme pain in left L hip area. He dropped to his knees crying from pain. Denies prior discomfort or indication of pain prior to DOI. Denies stepping on rock or in a hole. Denies any problems while operating forklift.

Claimant's Exhibit B, p. 1.

10. On September 20, 2007, Ms. Parsons authored a letter to Claimant formally denying his claim on the basis that he had failed to substantiate that he had suffered an accident. On September 24, after Claimant received the denial letter, he phoned Ms. Parsons angrily disagreeing with her decision to deny his claim. Even then, Claimant did not mention the lifting incident. It was not until Surety received a copy of Claimant's Complaint, which was filed on October 18, 2007, that they learned that Claimant was alleging an accident.

11. Although suspicious regarding the happening of the lifting incident, it is not necessary to decide whether that incident did or did not occur. The only medical evidence introduced regarding causation is a letter from Dr. Thorne dated September 24, 2007, that states:

> This patient performs rather heavy lifting while working in a steel salvage yard. On 8-21-07 he sustained severe pain and tenderness in the left groin region and a left inguinal hernia was diagnosed. In my opinion, this hernia occurred while working and, therefore, qualifies as an on the job injury.

Claimant's Exhibit E, p. 20.

12. While Dr. Thorne is certainly entitled to his legal opinion, hard work does not an accident make. See *Nycum v. Triangle Dairy Co.*, 109 Idaho 858, 712 P.2d 559 (1985). Further, to establish an accident, Claimant must show more than the onset of pain at work. *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004). Here, Dr. Thorne never mentions

anything about a lifting incident, probably because Claimant never told him about it.[1] Finally, there is no evidence that the lifting incident, if it happened, resulted in any violence to the physical structure of Claimant's body. Claimant felt no pain at that time. When asked specifically by the Referee when the pain started, Claimant testified that he was about ten feet away from where he dropped the metal plate.

13. The Referee finds that Claimant has failed to prove he suffered an injury arising out of and in the course of his employment and his Complaint should be dismissed with prejudice.

CONCLUSION OF LAW

Claimant has failed to prove he suffered an injury caused by an accident arising out of and in the course of employment and his Complaint should be dismissed with prejudice.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusion of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this __21st__ day of May, 2008.

INDUSTRIAL COMMISSION

_/s/_____
Michael E. Powers, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

[1] Claimant testified he told Dr. Thorne of the lifting incident sometime after his August 31st surgery, which would have presumably been about a month before Dr. Thorne wrote his "causation" letter. Again, there is no mention of the lifting incident in any of his post-surgery follow-up notes.

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KORRI RASMUSSEN, Claimant, v. GARY W. LONGFELLOW, dba SLIMS RECYCLING, Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 2007-029514** **ORDER** filed May 21, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusion of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove he suffered an injury caused by an accident arising out of and in the course of employment and his Complaint is dismissed with prejudice.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 21st__ day of May, 2008.

INDUSTRIAL COMMISSION

__/s/_____
James F. Kile, Chairman

_/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21st_ day of May, 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

CRAIG M YOUNG
PO BOX 287
LEWISTON ID 83501

BRADLEY J STODDARD
PO BOX 896
COUER D'ALENE ID 83816-0896

ge __/s/_____